SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 235.

JOEL B. ERHARDT, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR.

vs.

JOSEPHINE W. WUPPERMANN AND GEORGE WUPPERMANN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Josephine W. Wuppermann and George Wuppermann, plaintiff, and Joel B. Erhardt, defendant, a manifest error hath happened, to the great damage of the said Joel B. Erhardt, plaintiff in error, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the part' aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the eighteenth day of July, eighteen hundred and ninety-one, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Melvilie W. Fuller, Chief Justice of the said Supreme Court, the 23d day of June, in the year of our Lord one thousand eight hundred and ninety one.

[SEAL.] JOHN A. SHIELDS, *Cl'k.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to seventy-three inclusive, contain a true and complete transcript of the records and proceedings had in said court, in the case of Joel B. Erhardt, plaintiff in error, against Josephine W. Wuppermann and George Wuppermann, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this sixteenth day of July, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsed:) E. & A. B. 1009. U. S. 16212. U. S. Supreme Court. Joel B. Erhardt, plaintiff in error, against Josephine W. Wuppermann et al., defendants in error, Writ of error. Edward Mitchell, U. S. attorney & attorney for plaintiff in error. Due service of copy of the within writ of error is hereby admitted this 24 day of June, 1891. Hartley & Coleman, attorneys for defendants in error. U. S. circuit court. John A. Shields, clerk. Filed Jun. 24, 1891.

3 United States circuit court for the southern district of New York.

JOSEPHINE W. WUPPERMANN AND GEORGE Wuppermann
against
JOEL B. ERHARDT.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, this 7th day of March, in the year one thousand eight hundred and ninety.

[L.S.] JOHN A. SHIELDS, *Clerk.*

HARTLEY & COLEMAN, *Plaintiff's Attorneys,*
(Office and post-office address) 62 *Wall Street, New York City.*

4 (Indorsed:) 3396. United States circuit court, southern district of New York. J. W. Wuppermann et al., vs. Joel B. Erhardt. Summons. Hartley & Coleman, plaintiffs' attorneys. To the defendant within named. Take notice. That upon default judgment will be taken for the sum of ——— dollars, in money, with interest from the day of ——— 1890, besides costs. Plaintiffs' attorney. Personally served, Mar. 7, 1890. Custom-house, New York.

5 United States circuit court, southern district of New York.

JOSEPHINE W. WUPPERMANN AND GEORGE Wupperman, plaintiffs,
against
JOEL B. ERHARDT, DEFENDANT. } Complaint.

Plaintiffs complain—

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were, during said times, partners in trade, under the firm name of J. W. Wupperman, and as such, duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. That plaintiffs, in order to obtain said goods, were compelled to pay the defendant, as such collector, in excess of the lawful rate of duty on said goods and of the amount required by law, the sum of thirty-three hundred & ninety-eight $\frac{50}{100}$ dollars.

4th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto.

5th. That plaintiffs made due and timely appeals on each entry to the Secretary of the Treasury, who affirmed the decision of the defendant upon said entries.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, if rendered, together with the other particulars required by law, and is made a part hereof.

7th. That said sum, so exacted as aforesaid, has never been repaid to plaintiffs, and is still due and owing to them.

Wherefore, plaintiffs demand judgment against defendant for the sum so exacted as aforesaid with interest on the several sums named in the bill of particulars, from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

HARTLEY & COLEMAN,
Attorneys for Plaintiffs.

(Indorsed:) 16212. U. S. circuit court, southern district of New York. Josephine W. Wupperman against Joel B. Erhardt. Complaint and bill of particulars. Due service of a copy hereof is hereby acknowledged this day of , 189 . Atty. for deft. Hartley & Coleman, ptffs.' attorneys, 62 Wall street, New York City.

6 *Bill of particulars.*

Name of importer (for all the importations), J. W. Wupperman.

Description of goods.	Name of vessel.	Whence imported.	Date of invoice. 1889.	Date of entry at custom-house. 1890.	Date of payment of duties in excess. 1890.	Amount of duty illegally exacted. $
Angostura bitters..	Bermuda	Trinidad....	Dec. 18.....	Jan. 8..... *1889.*	Jan. 8..... *1889.*	908. 50
Do.....	Neptuno.....	....do	" 14.....	Dec. 23.....	Dec. 23.....	920
Do.....	Bermuda	....do	Nov. 15	Nov. 30	" 2.....	920
Do.....	Trinidad.....	....do	Oct. 25	Nov. 13	Nov. 13	650

Description of goods.	Name of vessel.	Whence imported.	Protest filed. 1890.	Date of appeal to Secretary of the Treasury. 1890.	Date of Secretary's decision. 1890.
Angostura bitters.....	Bermuda ...	Trinidad....	Jan. 22.....	Jan. 22.....	Mar. 6.
Do	Neptuno.....	....do	" 11..... *1889.*	" 11..... *1889.*	Feb. 13.
Do	Bermuda ...	....do	Dec. 13.....	Dec. 13	" 13. *1889.*
Do	Trinidad.....	....do	Nov. 26	Nov. 26.....	Dec. 27.

7 Circuit court of the United States for the southern district of New York.

J. W. WUPPERMAN
versus
JOEL B. ERHARDT, COLLECTOR, ETC. } N. S. 16212.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint, was as stated in the com-

plaint; and he denies that the plaintiffs were compelled to pay or did pay to the defendant, as collector or otherwise, the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with the defendant any protest or protests, as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint, or any sum, is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to to whether the goods alleged in the complaint to have been imported, at the time therein mentioned, were, in fact, such goods as are described in the said complaint.

V. And, further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And, further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And, further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon, or within ninety days after payment of duties paid thereon after such decision.

VIII. And, further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And, further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were demanded of the plaintiffs and were by the plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by the defendant, in his official capacity aforesaid, to the United States and placed beyond his control.

X. And, further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were sums due from the plaintiffs to the United States as duties, according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plainitffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

EDWARD MITCHELL,
U. S. Attorney, Attorney for the Defendant.

8 (Indorsed:) 16212. U. S. circuit court, southern district of New York. J. W. Wuppermann vs. Joel B. Erhardt, collector, etc. Copy. Answer. Edward Mitchell, United States attorney, attorney for defendant. Sirs: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated New York, May 19, 1890. Yours, etc., Edward Mitchell, U. S. att'y & att'y for def't. To Hartley & Coleman, attorneys for plaintiffs. Due service of a copy of an answer, of which the within is a copy, and of the above notice, is hereby admitted. Dated New York, , 1890. , attorneys for plaintiffs.

9 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Monday, the 16th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

Present, the honorable E. Henry Lacombe, circuit judge.

JOSEPHINE W. WUPPERMANN ET AL.
vs.
JOEL B. ERHARDT. } N. S. 16012.

Now come the plaintiffs, by Edward Hartley, esq., their attorney, and move the trial of this cause.

Likewise comes the defendant by James T. Van Rensellaer, esq., assistant United States attorney, his attorney.

After hearing the evidence of the respective parties, the argument of counsel, and the instructions of the court, the jury retire under charge of an officer duly qualified to attend them, and upon return, on the 17th inst., say that they find a verdict for the plaintiffs in sum of three thousand and ninety-one dollars and forty-one cents ($3,091 41/100).

On motion of James T. Van Rensellaer, esq., ordered that the defendant have a stay of sixty days in which to make and serve a case with leave to turn the same into a bill of exceptions.

10 On like motion, ordered that a certificate of probable cause be granted.

An abstract of the minutes.

JOHN A. SHIELDS, *Clerk.*

11 U. S. circuit court, southern district of New York.

JOSEPHINE W. WUPPERMANN, ET AL.
vs.
JOEL B. ERHARDT. } N. S. 16212.

This action having been tried at the October term of this court of A. D. 1890, before the Hon. E. Henry Lacombe, judge, and a jury, and a verdict having been rendered on the 17th day of February, 1891, in favor of the plaintiffs and against the defendant for the sum of three thousand and ninety-one dollaes and forty-one cents ($3,091 41/100), and the costs of said defendants having been duly taxed in the sum of fifty-five 85/100 dollars, and

interest on said verdict from the date of its rendition to this day having been computed in the sum of sixty-four $\frac{91}{100}$ dollars, which said debt, damages, and costs amount in the whole to the sum of thirty-two hundred and twelve $\frac{17}{100}$ dollars, therefore, it is considered that the plaintiffs have judgment against the defendants for the sum of thirty-two hundred and twelve $\frac{17}{100}$ dollars aforesaid, and have execution therefor; and it is hereby certified under the statute in such cases made and provided that the defendant had probable cause in making the exaction complained of.

Judgment signed this 22nd day of June, 1891.

JOHN A. SHIELDS, *Clerk.*

Judg't.....	$3,091.41
Interest.....	64.91
Costs.....	55.85
	$3,212.17

12 (Endorsed:) 16212. U. S. circuit court, southern district N. York. J. W. Wuppermann et al. v. Joel B. Erhardt. Judg't roll. Hartley & Coleman, pl'ffs' att'ys, 62 Wall street, N. York City. U. S. circuit court. Filed, June 22, 1891. John A. Shields, clerk.

13 United States circuit court, southern district of New York.

JOSEPHINE W. WUPPERMANN ET AL.
vs.
JOEL B. ERHARDT. } N. S. 16212.

Defendant's bill of exceptions.

And afterwards, to wit, on the 16th day of February, 1891, this case came on to be tried before the honorable E. Henry Lacombe, circuit judge, and a jury duly impaneled and sworn to try the issues herein. The parties appeared by their counsel Messrs. Hartley & Coleman for the plaintiffs, and Messrs. Edward Mitchell, U. S. attorney, and James T. Van Rensselaer, assistant U. S. attorney, for the defendant, and during the course of the trial and before the rendering of the verdict therein, the counsel for the defendant did take and allege certain exceptions to certain rulings of the court, which said exceptions were by the court duly allowed and are hereinafter specifically set forth.

To sustain the issues upon their part the plaintiffs introduced the evidence of

ALFRED SCHOENWARK, who being sworn and examined as a witness in behalf of the plaintiffs and examined by plaintiffs' counsel, testified
14 in substance as follows: That he was in the employ of the plaintiffs, whose business was agents for bitters and the general commission business with the West Indies and South America; agents for the bitters of Dr. Siegert & Hijos [Sons]; that he had been with the firm 11 years and 4 months. [Being shown an entry.], That is an entry made at the New York custom-house for the plaintiffs. [Invoice shown witness.] This is the invoice accompanying it; the invoice is with the signature of Carlos D. Siegert; the invoice is of Dr. J. G. B. Siegert & Sons, the manufac-

turers of Angostura bitters. [Protest shown witness.] That is the protest filed with the invoice; the signature of J. W. Wuppermann is on it. (Entry by steamship Bermuda, January 9, 1890, 750 cases Angostura bitters offered in evidence and marked Exhibit 1.) (Invoice of Dr. J. G. B. Siegert & Sons, dated at Trinidad, 18 December, 1889, "J. W. W., 2,750 cases of Angostbra bitters, cont'g 24–2 each, at $7," offered in evidence and marked Exhibit 1–i.) (Protest as follows, offered in evidence and marked Exhibit 1–p): "New York, January 22, 1890. Sir: We protest against your decision as to the rate and amount of duties to be paid on the Angostura bitters entered by us Jan. 8, 1890, entry No. 3954, per Bermuda from Trinidad, because under the existing tariff, Schedule A, the rate is 50 per cent on the value of the bitters as a proprietary preparation, and bitters T. I. now 99 and 30 per cent on the value of the filled bottles containing the same, Schedule B, T. I. now 133. We pay the excess exacted under compulsion, solely to get the goods. J. W. Wuppermann (care of Hartley & Coleman, att'ys, 62 Wall street), collector of customs, New York City."

15 (Handing papers to witness.)

The remaining entries, invoices, and protests named in the bill of particulars were similar to the above. All these entries are for Angostura bitters. I have a sample of the bitters here in my pocket.

Being cross-examined by defendant's counsel: My department with Wuppermann & Co. was bookkeeper. I received the goods in the warehouse in our store and office; I personally saw this sample taken from the case; I am not positive that it comes from one of the invoices offered in evidence in this case; this is a later importation, I believe, but I am not sure; it may not be from one of the invoices, because it has been from the bonded warehouse and duty paid, and it came to our store. We generally take half a dozen or so, sometimes more, and it may be from one of those shipments and may not be.

(By plaintiffs' counsel:) There is no difference in the way Angostura bitters are put up. They are all alike; bottles of the same size, and large bottles containing exactly the same wrappers and the same labels, the same thing as far as I know, except that we have also large bottles, only differing in size.

(By the court:) What is in the bottles is always the same thing as far as I know.

(By plaintiffs' counsel:) In looking over those invoices I can tell the size of the bottles. Some of those invoices contain entries for large bottles and for small bottles.

16 (By defendant's counsel:) The invoices in suit include bottles of that size [indicating]. I know that the bottles in the other importations are the same as the merchandise in this present one in suit from my general experience in the business; I have opened the cases; I have taken out the bottles and I have sold the goods.

Q. How do you know that the exporters in Trinidad did not put up another kind of goods altogether in those bottles?

A. From what Mr. Siegert told me in 1881; that they did not put up anything else under the name of Angostura bitters, and nothing with these wrappers and labels on except those bottles. To my knowledge, during

the 11 years I am with the firm I never saw anything else put up in these bottles, except as some man might use it in a barroom to put something else in.

Q. But the bottles coming from the other side, and looking like the others, may very well nevertheless have contained an entirely different article, so far as you know?

A. They might; only in that case it does not come from Siegert; when it comes from Siegert's in those cases that come from Trinidad then there is nothing else in them except Angostura bitters; I have tasted it myself for the last 11 years; I suppose I have tasted the Angostura bitters from the importations in suit; that depends entirely whether there were any broken cases amongst them; my impression is that I tasted the Angostura bitters from the importations in suit; I tasted some of the Angostura
17 bitters from the lot from which that sample was taken; I am positive about that because I took a drink only day before yesterday; I am not sure that I tasted any from the four importations in suit; I can tell by looking at the box.

(Introduction of the sample in evidence in objected to by defendant's counsel on the ground that it has not been proved that it is a part of the merchandise in suit or that a sample can not be obtained from those importations and that the witness can not testify that it is the same thing.)

By the COURT:

Q. Your house has been importing this article for the past 11 years?

A. From 11 to 12 years.

Q. And have been selling it?

A. Yes.

Q. And it has not been returned to you ever, with the complaint that it was not the article represented?

A. Never.

(Sample offered in evidence. Objection by defendant's counsel overruled by the court; exception by defendant's counsel, which exception was allowed by the court. Sample marked in evidence Exhibit 5.)

These bitters came from Trinidad, from J. G. B. Siegert & Sons; they are the manufacturers of Angostura bitters; they sell them to us; we have been dealing in them for 11 years and 4 months; bought them from Siegert all the time; the business of Mr. Siegert in Trinidad is the manufacture of Angostura bitters, and they manufacture also curacoa, which is a cordial imported into this country; the bottles of Angostura bitters when imported come just as it is now, with the same wrapper in those
18 particular four importations exactly the same as that, except that we have larger bottles; the larger bottles have labels exactly like that; it goes around the bottle; it is the same wrapper exactly; there are some circulars in the case besides this wrapper; here is one of them; besides the wrappers, this circular comes packed up with the cases of those bitters, and there is this book in four languages, English, German, French, and Spanish, and this circular, and then for some time this circular has been in; every time there is this here, and this book in four languages and this circular. The two circulars and the book referred to are offered in evidence by plaintiffs' counsel. Objected to by defendant's counsel, on the ground that it does not yet appear that said papers came with the goods that are sold here.)

By PLAINTIFFS' COUNSEL:

Q. You sell all your goods by the case?

A. We only sell by the case. We do not sell by the bottle at all.

(The three papers admitted in evidence by the court. Exception by defendant's counsel, which exception was allowed by the court. The three papers are marked in evidence collectively Exhibit 6.)

"Aromatic Bitters or Angostura Bitters, formerly prepared at Angostura by Doctor Siegert, and now in Port of Spain, Trinidad, by his sons and successors under the old firm name of Dr. J. G. B. Siegert & Hijos.

"These bitters do not only distinguish themselves by their flavour and aromatic odour above all others generally used, but are at the same time an excellent tonic and an efficacious stimulant to incite the appetite.

They are principally used thus: pour half a tablespoonfull in a
19 wine-glass, mix it with rum, wine, or other lic'or, and take it before breakfast or dinner, or any other hour of the day if you should feel inclined; they can likewise be used in sugar and water or syrup, and thus composed they have an agreeable taste and are more suitable for ladies and children. They are, moreover, an excellent remedy for removing indigestion, flatulency, hysterical and hypochondriac attacks, colics, pains of the stomach, and diarrhœa which originates from weakness and relaxation of the digestive organs. In such cases the dose is from half to one tablespoonful, according to the violence of the attack, and may be taken mixed as above mentioned or pure, once or several times per hour, or in the course of the day until the disease disappears. Besides their extreme usefulness in the cure of fever and ague, they are also an excellent preservative against the aforesaid maladies; in the former case the dose is from half to one tablespoonful, either mixed as above, and to be taken two, three, four, or more times during the day while the patient is free from fever; in the lat'er case adapt their principal application according to the general use of bitters. When administered to children above two years old, the dose should be from 20 to 60 drops, in proportion to the age. In fine, they can be applied with success for the improvement of new rum, by using two tablespoonsfull of bitters to each gallon of rum, and thus they remove its bad smell and acrid taste, giving it immediately an agreeable flavour similar to old rum.

"Besides the above-mentioned advantageous qualities of these bitters, they are of a most important service as a remedy against the
20 Asiatic cholera and cholerin, in every instance where they have been employed with sp'endid success. In such cases the dose is of one or two tablespoon full, repeating the same every day three or four times until a favorable result is obtained, which is very often experienced. For women and children the doses are to be smaller in proportion to their age and constitution, and to be taken mixed with good wine, brandy, or pure. Their ordinary daily use as bitters is generally found to be a preservative against the aforesaid cholera and cholerin."

That information is on these bottles in English, French, German, and Spanish.

Q. And also the signature of Siegert & Hijos?

A. That is only the signature of the inventor; also another label, a United States internal-revenue stamp or an imitation of it; we put that

label on for the United States only; also "J. W. Wuppermann, sole agent, New York," and "Dr. Siegert & Sons, Trinidad, British West Indies, Port of Spain."

(Plaintiffs' counsel reads the other circular, likewise marked Exhibit 6, which is also printed in four languages, and warns the public against counterfeits and imitations and notifies them of the contents of the label.)

This book, Exhibit 6, is a book giving an account of the medical virtues of the bitters, and that book is also in four languages; that is, the English edition.

The following are extracts from this book:

"Moreover these bitters of Dr. Siegert's invention were awarded the highest distinction and most honorable mention at the exhibi-
21 tions of London, Paris, Vienna, Philadelphia, Santiago de Chile, Sydney, Melbourne, Christchurch (New Zealand), New York, Amsterdam, and Calcutta.

"Messrs. J. G. B. Siegert & Sons take this opportunity to caution the public against the many imitations now offered as Angostura Bitters, and to call particular attention to the fact that on each bottle of the genuine Angostura Bitters there is a label bearing the signature of Dr. J. G. B. Siegert between the two representations of the medal of merit, and that each case of their bitters contains a circular of Messrs. Dr. J. G. B. Siegert & Sons certifying the genuineness of its contents.

"These bitters are generally used thus:

"Pour half a tablespoonful/ into a wine glass, adding wine or spirits, and take it before breakfast or dinner, or at any other time of the day, if required. Being made of a very strong and pure spirit, they are also used in sugared water, or syrups, in which form they are an agreeable and effective tonic, and are more suited to ladies and children.

"For children above two years old the quantity used should be from twenty to sixty drops, according to age. When used with syrup and soda, or potass water, they make a very agreeable as well as a most refreshing and invigorating drink in warm weather. These bitters also form a very important ingredient in many of the fancy American drinks as used in the United States.

"They are an excellent remedy for removing indigestion, flatulency, hysterical and hypochondric attacks, colics and pains of the stomach,
22 and diarrhœa, arising from weakness and relaxation of the digestive organs. They are invaluable as a curative of fever and ague, in which case the dose is from half a tablespoonful/ to a whole, taken as above, three or four times a day while the patient is free from fever. For Asiatic cholera, or cholerine, these bitters have proved a very effective remedy, taking one or two tablespoon'ful/ two or three times a day in good wine or spirits, or pure.

"Scientific opinions on the Angostura Bitters of Messrs. Dr. J. G. B. Siegert & Sons.

"(1) I have subjected the aromatic bitters of Messrs. Dr. J. G. B. Siegert & Sons to a very searching examination, consisting of a chemical analysis and an investigation for determining the strength of the drugs and their physiological effects.

"The result of these investigations proves the aromatic bitters to be entirely free from all insalutary, over-active, acrid, and intoxicating ingre-

dients. The bitters, on the contrary, only contain most beneficial ingredients, such as bitter, aromatic, balsamic, tonic, strengthening, and antiasthenic vegetable substances, particularly those which are derived from plants which are indigenous to tropical America. For this reason the European imitation of Dr. Siegert's bitters can not be equal to the genuine and original American bitters, because the corresponding extracts are never sent to Europe. The artistic combination of these excellent ingredients renders the bitters of Dr. Siegert one of the purest and most useful hygienic liqueurs now extant, as it can be used by invalids and those
23 in good health, by adults and by children, with equal advantage. For the public this liqueur forms an attractive social drink, and for the sick a useful remedy, which may be particularly recommended in complaints of the stomach and bowels, want of appetite, weakness of the stomach, difficult and painful digestion, complaints of the liver, jaundice, hypocondriasis, hysteria, lowness of spirits, chloerine, diarrhœa, vomiting, seasickness, &c., and also as a safe domestic cordial.

"The foregoing I hereby certify according to the best of my knowledge and in all good faith.—Dr. Hess. Approved Royal Prussian Apothecary (1st class) exam'ing chemist and scientific expert, Berlin, 19th July, 1871.

"(II) The Aromatic Bitters of Messrs. Dr. Siegert & Sons is, doubtless, one of the most beneficial discoveries of the present time.

"It owes its extraordinary and well-proved restorative powers to the happy choice and combination of the effective American vegetable substance employed in its manufacture. These ingredients, belonging partly to the tonic and invigorant, and partly to the aromatic and balsamic classes of plants, are not only unprejudicial, but on the contrary are very helpful and advantageous to health.

"When these ingredients are compounded in this form and are used in moderate quantities, and often repeated (a necessity of the essence form of the bitters), they possess a tendency to excite the appetite, strengthen the digestion, and promote the natural motion of the intestinal canal and
24 the annihilation of the food, in this manner furthering the formation of blood, so that the disturbances in those functions of the body which produce certain indisposition are either prevented or cured. To these ailments particularly belong want of appetite, lassitude, and torpor of the intestinal canal which are exhibited by such systems as constipation or diarrhœa, and in addition flatulence, eructations, hypocondriasis, ennui, hysterical fits, &c.

"All these disturbances of the system with the diseases which they produce are prevented or cured by the Aromatic Bitters of Messrs. Dr. Siegert & Sons, a conclusion I have only arrived at after many experiments; and in colic, cholera, cholerine, the hemorrhagic diathesis, this essence has been proved to be best dietetic remedy.—Dr. Johanus Muller, medical council, Berlin, July, 1871.

"(III) These genuine bitters which are prepared with the greatest care and chemical accuracy from American plants, which make, when mixed with water, beer, wine, and spirits, such a splendid drink, I have submitted the same to a medical examination, and I must confess that I consider this essence by far the best, most effective, and most useful of all the preparation' of the kind. It is able to render extraordinary service in

restoring to the normal state a stomach and bowels which have become atonic and sluggish in their action. It is free from all heating and drastic ingredients, and its power of purifying the blood is beyond doubt. From a medical point of view this essence is to be recommended in the following diseases: Want of appetite, complaints of the stomach, cramp of the stomach, sickness, hemorrhoide, Asiatic and European cholera, dyspepsia, malaise, and headache proceeding from the stomach, and also as a preventative of contagious diseases.

"These bitters are the most powerful stomachic and nervine which we possess, and therefore may be warmly recommended by medical men.—A. Groyen, doctor in medicine and surgery, Royal medical staff. Berlin, July, 1871.

"(IV) I have carefully analyzed a sample of the well-known Angostura Bitters of Messrs. Seigbert & Sons. I find that they consist of a mixture of certain bitter, aromatic, and carminative substances, together with alcohol added as a preservative and solvent, and that they are altogether free from admixture with any dangerous or deleterious compound, as strychnine, for example, so commonly present in what are termed 'pick me ups.'

"These bitters constitute, in fact, a very useful and wholesome tonic when employed in suitable cases.—Arthur Hill Hassal, M. D., author of 'Food and its adulterations,' adulterations detected, and late editor of 'Food, Water, and Air.' London, 1875.

"(V) Chemical laboratory of the University of Pennsylvania.

"I have examined the bottle of Angostura Bitters, invented and prepared by Dr. J. G. B. Siegert & Sons, Port of Spain, Trinidad, which has been handed to me for this purpose.

"I have found it a highly aromatic liquid and entirely free from injurious and poisonous substances.

"It is a very celebrated tonic, and altogether a most excellent article.—F. A. Genth. Philadelphia, 1876. Government laboratory, Trinidad, B. W. I.

"(VI) This is to certify that I have made a complete analysis, organic and mineral, of several samples of the Aromatic or Angostura Bitters, forwarded for the purpose by Dr. J. G. B. Siegert & Sons, the sole manufacturers.

"I find the bitters to consist of an alcoholic solution of vegetable substances possessing valuable medicinal properties.

"The bitters are free from all mineral substances and from deleterious alkaloid ingredients. As an aromatic carminative and febrifuge the bitters can not, in my opinion, be excelled.

"The constituents, which are of exceptional quality and purity, have been carefully selected and skillfully combined. I consider the Aromatic or Angostura Bitters superior to every commercial article of a similar nature.

"During a period of six years I have, for the purpose of comparison, made analyses of Messrs. Siegert's bitters, and I have always found the compound constant in composition and superior in quality and flavour.—Ino McCarthy, Government analyst and professor of chemistry, fellow of the Institute of Chemistry, the chemical societies of London and Washington, U. S. A., &c., &c., &c.. Port of Spain, 19th January, 1886."

27 (Plaintiffs' counsel offers in evidence certified copy, first, of the trade-mark of the wrapper which surrounds the bottle, trade-mark of registered label No. 4281, registered at the Patent Office in Washington, December 2, 1884, by Doctor J. G. B. Siegert and Hejos, of Port of Spain :) that label is the same as the one around the bottle which was read to the jury ; it is exactly the same.

Objected to by defendant's counsel on the ground that the mere filing of registered trade-mark in Washington is not proof of a proprietary article. Objection overruled ; exception by defendant's counsel, which exception was allowed by the court. Certified copy registered trade-mark admitted in evidence and marked Exhibit 7.

(Plaintiffs' counsel offers in evidence trade-mark No. 7204, registered April 15, 1879, by Dr. J. G. B. Siegert, said trade-mark consisting of a signature. Objected to by defendant's counsel as being incompetent and irrelevant and as not referring to the particular article in suit.)

Q. That signature appears on each bottle?

A. Yes.

Objection overruled by the court ; exception by defendant's counsel, which exception was allowed by the court. Certified copy of registered trade-mark No. 7204, marked in evidence Exhibit 8.

(Plaintiffs' counsel offers in evidence registered trade-mark No. 7258, filed May 6, 1879, by Dr. Siegert & Sons, wherein they take for their trade-mark the word "Angostura." Objected to as incompetent and irrelevant ; objection overruled by the court ; exception by defendant's counsel, which exception was allowed by the court. Marked Exhibit 9.)

28 I have sold those botters for the last 11 years.

(By defendant's counsel :) I have been selling the bitters. Sometimes when nobody is there I go to our customers and sell them. I first began to sell them when I first came here ; that was in October, 1879. At that time it was J. W. Hancox, the former agent. The firm of Wuppermann & Co. was not in existence 11 years ago. The firm of J. W. Wuppermann & Co. has been in existence since 1881. I have sold the bitters to several people. I have made some sales. I have sold, but it has not been my regular business with the firm ; my regular business is bookkeeping and general clerk, but I have sold from time to time.

BY PLAINTIFFS' COUNSEL: Q. You record all the sales that take place in the firm on a book?

A. I have general supervision of it. I have not to make the entries myself, but I know who they go to, who buy them.

(By defendant's counsel :) I am a bookkeeper there, and have general supervision of the routine part of the business, and of keeping the due book in which the sales are recorded, and when they are due, and I know exactly how they go out ; and besides that we do our business mainly with wholesale dealers. I know, to whom all the bitters are sold from that house. I know the names of the parties, the names of the firm, and I know what class of dealers they are. I have been to all these firms here in the city. I have never traveled but here in the city ; I know them. I should think that 50 per cent of the firm's sales are in the city. I know about the parties to whom the goods are sold outside of the city from

29 their business cards and letter headings ; that one is a liquor dealer, and another a druggist, and another a grocer, and so on. And I

have been around to see the customers, so that if one dozen Angosture Bitters were sold I should know exactly where it went to.

(By plaintiffs' counsel): Our sales are principally made to fancy grocers, liquor dealers, fancy produce grocers like Acker, Merrill & Co.; most of them are wholesale dealers; we sell occasionally a case to a man.

Q. Do you sell to firms dealing in patent medicines?

(Objected to by defendant's counsel as incompetent, irrelevant, and immaterial; question allowed; exception by defendant's counsel, which exception was allowed by the court.)

We sell to men who deal entirely in patent medicines, like Charles Dutton; he sells 40 or 50 cases every year; we sell to McKesson & Robbins perhaps 75 to 100 cases per year; we sell to Schieffelin & Co.; they are wholesale drug houses; we sell to the Hegeman Corporation; that is a wholesale drug house; and also to David N. Stigert & Co., another wholesale drug house; and a drug house in Maiden Lane; and we used to sell to Rheinboldt & Co., and we used to sell to several other firms that I do not remember at present; we sell to wholesale liquor dealers, and we sell to grocers like Acker, Merrill & Co. and Park & Tilford; they are our best customers; we sell to other customers; we sell almost entirely to grocers that carry liquors and bitters in stock; we advertise this
30 article quite extensively in the Druggist's Circular and produce catalogues, and in daily newspapers, and weekly, and the funny papers, and in other papers; we do not deal in any alcoholic preparations, any brandies and cordials, except what the firm of Siegert makes, and that we sell very little of; we have not sold ten cases in a year of this curacoa and other things mentioned in this circular.

Being cross-examined by defendant's counsel, witnes' testified in substance: We have sold these Angostura Bitters to wholesale grocers; we sell to Acker, Merrall & Condit, of New York, and to Park & Tilford; these are both very large wholesale grocery houses; we sell to Thurber, Whyland & Co., also to H. B. Kirk & Co., whole-ale liquor dealers, and to Goldsmith & Co., wholesale liquor dealers, and to Hunt & Leech, 41 Beaver street (it used to be Purdy & Nicholas), and to Lidgerwood & Co., and we sell to many other wholesale liquor dealers in New York; we sell to wholesale grocers out of the city; for instance, in Chicago, we sell to C. Jorne & Co., the largest wholesale grocer' in Chicago, and to H. C. Slack, and to Park & Tilford, at Cincinnati, and to Smith & Co., in New Orleans, and to Nichols & Co., the principal wholesale grocer' in St. Louis; we sell to wholesale grocers in other part of the country; in Galveston, Texas, we sell to Hydenheimer; in San Francisco the agency is in charge of another agent; we only send to our agent there; we sell to wholesale liquor dealers outside of the city of New York; we sell to the largest wholesale liquor house in Philadelphia, Henry Ramsdell & Co.;
31 in Chicago we sell to the largest liquor dealers there; we also sell in St. Louis and in Cincinnati. Park & Tilford are among our best customers; they are large wholesale grocers here in New York City.

Q. Don't you sell a hundred cases of Angostura Bitters to wholesale grocers and to wholesale liquor dealers where you sell one case to wholesale druggists?

A. I would not be positive about it.

Q. Are you positive that you do not?

A. I would not say that we do not and I would not say that we do; I have never made any comparison; I think that proportion would be a little too great.

Q. Will you testify that you do not sell 75 cases of bitters to wholesale grocers and wholesale liquor dealers where you sell one case to wholesale druggists?

A. I might testify if I looked over the books; we do not sell as much to druggists, but in what comparison we sell I can not state.

Q. Then you are not positive that you do not sell 75 cases to wholesale grocers and liquor dealers where you sell one case to druggists?

A. I would not be positive about that, but that is, according to my experience, too small a percentage; I am ready to say from what I have got in my mind at present and from my general knowledge of the business that we sell perhaps 50 cases to grocers and liquor dealers to 1 or 2 cases to wholesale druggists; that is a thing I can tell you exactly if I look over the books; we do not sell to any retail grocers or liquor dealers, but sometimes we do not refuse a man if he has the cash; we
32 do not sell to any of the large hotels in New York directly.

Redirect examination by plaintiffs' counsel:

I would say that the wholesale grocers in the United States take about one-half; for instance, Acker, Merrall & Condit and Park & Tilford—and they take the most of what is sold here in the city.

Plaintiffs further produced the testimony of—

JOHN C. AVILES, who being duly sworn and examined as a witness in behalf of the plaintiffs and examined by plaintiffs' counsel, testified, in substance, as follows: I reside at 318 West 116th street; am a sale'man for J. W. Wuppermann; have been salesman for about ten months; am acquainted with an article called Angostura Bitters; my business in the firm in relation to that article is to push it in every place where it is used I know about the use of Angostura Bitters.

Q. Go on and state.

(By defendant's counsel:) I know of its use from personal experience and from hearsay from other people. Have not been a barkeeper; I have seen that in the vicinity of 90 per cent of the drug stores of this city have it always in stock and sell it. I make the computation of 90 per cent because I have certainly visited—if we say that there are 2,000 druggists in the city—I have certainly visited 1,500, and of those probably 100 have not had it from the simple fact that they were too small or did not deal in such expensive articles, and all the others had it. That is my only experience as to the use of this article as far as the druggists are concerned.

33 (By plaintiffs' counsel:) I have never seen this article administered as a medicine by druggists; I don't know how it is administered; I have sold no article besides this.

Being cross-examined by defendant's counsel, witness testified in substance: It has been a part of my duty to visit the wholesale grocers and wholesale liquor dealers in connection with this article; I have visited some of the wholesale grocers and liquor dealers that Mr. Schoenwark mentioned in his testimony; have all dealt in the article; I have visited

the hotel bars and other bars in the city of New York; some deal in Angostura Bitters.

Q. Don't they nearly all deal in them?

A. It is half and half.

Q. Do you mean to say that half the bars in New York do not have Angostura Bitters?

A. No, sir; some of them, unfortunately, have imitations.

Q. But they have Angostura Botters?

A. No, sir.

Q. You say, as I understand you, that one-half of them do not have Angostura Bitters?

A. That is it; I have seen them use Dr. Siegert's Angostura Bitters at the bars.

Q. They put them in nearly every cocktail they make, don't they?

A. Yes; those that use Angostura Bitters of Dr. Siegert's use them in cocktails.

Q. They put it with a great deal of the sherry that they sell over the bars?

A. Some use only the Angostura Bitters of Dr. Siegert's, and
34 others mix it with calisaya; they use it with almost all the bitters sold over the bar; they use it with a great variety of mixed drinks which they sell over bars; that is, so far as Dr. Siegert's Bitters are concerned, at 50 per cent of the bars in New York; perhaps a little more, I can not say exactly; 75 per cent of them may use Dr. Siegert's Bitters.

(By plaintiffs' counsel:) I have seen other articles used at the bars besides Angostura Bitters—lemon, sugar, orange peel, and various things.

(By defendant's counsel:) You have seen different kinds of cordials sold over bars?

A. What do you term a cordial?

Q. What is known as a cordial in the English language.

A. I have; I have seen absinthe sold over bars, but very seldom; I do not recollect to have seen kirschwasser sold over bars.

Plaintiffs further introduced the testimony of—

FREDERICK W. BROOKS, who, being duly sworn and examined as a witness on the part of the plaintiffs, testified in substance as follows: I am a clerk at the custom-house; I have made a computation of the excessive duties exacted, if the theory of the plaintiffs is correct. The total is $2,986.50 of principal, and the interest on it, at 3 per cent, is $104.91; making in all $3,071.41.

(By defendant's counsel:) That is the difference between the amount as assessed and collected by the collector, at $2 per gallon and 3 cents per bottle, and that claimed by the plaintiffs, at 50 per cent ad valorem on the bitters and 30 per cent ad valorem on the bottles; on Exhibit 1
35 the appraiser has returned the goods as "bitters (not proof)," cases of 24 half bottles, 2,163 gills to the bottle, $2 & 3 c."

By plaintiffs' counsel. The value of the bottles is separately stated in the invoice.

By plaintiffs' counsel. The return of the appraiser is the same in all the other cases; here is an invoice where they are different sized bottles; that is all the difference; the value of the bottle is expressed; they are returned the same in all cases as to the size of the bottles "Bitters (not proof)."

Plaintiffs' counsel offers in evidence from Worcester's and Webster's Dictionaries the following definitions:

Bitters.

Worcester: "A liquid or a spirituous liquor containing an infusion of bitter herb or roots."

Webster: "A liquor generally spirituous, in which a bitter herb, leaf, or root is steeped.

Cordial.

Worcester: "Aromatized and sweetened spirit or alcohol used as a beverage."

Webster: "Aromatized and sweetened spirits used as a beverage; a liquor."

Spirit.

Worcester: "A term applied to all inflammable liquors obtained by distillation, as brandy, rum, gin, whisky," &c.

Webster: "Any liquid produced by distillation; especially alcohol, the spirits, or spirit, of wine (it having been first distilled from wine; often in the p'ural. Rum, whisky, brandy, gin, and other distilled liquors
36 having much alcohol in distinction from wine and malt liquors."

Liquors.

Worcester: "A liquid substance—particularly a spiritous liquid. A fermented liquor."

Webster: "Specifically alcoholic or spiritous fluid, either distilled or fermented, as brandy, wine, whisky, beer," &c.

Plaintiffs further produced the evidence of—

HENRY J. SMITH, who, being duly sworn and examined as a witness on behalf of plaintiffs and examined by plaintiffs' counsel, testified in substance: My business is barkeeper at the Astor House. I have been engaged in that business 30 years; am acquainted with an article called Angostura Bitters; have been dispensing or using that article for 15 or 16 years, I suppose; it is used for cocktails entirely; that is what I used it for in my business; it is mixed with sugar, ice water, and gin or brandy; two or three squirts of it are usually put in a glass; two or three squirts would be enough for a glass of drink for any person for a cocktail; the rest of the drink is whisky, or gin, or brandy, or anything you like; I can not tell you the proportion of these Angostura Bitters in a drink by weight or by volume, *o*b'ut one-twentieth of a gin cocktail, I suppose; and besides that I put in sugar, lemon peel, and anything else to make it palatable; I am acquainted with the liquor called absinthe; have used it for a great number of years.

Q. How does this article differ from the article absinthe?

(Objected to by defendant's counsel as calling for a conclusion,
37 and because the question of difference or of similarity is one for the jury.)

The COURT. He can point out the points in which they resemble or differ.

(To which ruling of the court defendant's counsel duly excepted, which exception was allowed by the court.)

Q. What are the points of difference or resemblance between those articles, Angostura Bitters and absinthe?

(Same objection by defendant's counsel; question allowed by the court; exception by defendant's counsel, which exception was allowed by the court.)

A. One is used for bitters in a cocktail and the other is a drink by itself; you can drink that in a cocktail as well, but not for the same purpose.

Q. This is an article which is not made to drink by itself?

A. I never saw it drunk by itself.

Q. What is the difference in the taste?

(Same objection by defendant's counsel; question allowed by the court; exception by defendant's counsel, which exception was allowed by the court.)

A. There is a total difference in the taste—one is bitter and the other is not; one is much stronger than the other; absinthe is much stronger in spirits than the Angostura Bitters. I have handled the article called kirschwasser.

Q. What is that?

(Objected to unless the witness is shown to know the composition of it; question allowed; exception by defendant's counsel, which exception was allowed by the court.)

A. Kirschwasser is a liqueur or cordial, sweet, and made from cherries; it is never used for the same purpose as that is.

38 Q. Does it taste like it?

A. Not a bit; have never used ratafia; did not sell cordials at my bar such as curacoa.

Q. How do they differ from that?

A. They are sweet, the same as kirschwasser, more sweet than kirschwasser; kirschwasser and maraschino, &c., are all sweet, and are to be drunk after a meal; this is drunk before to give you an appetite.

Q. They are all beverages?

A. They are drunk by themselves; I have never known this to be drunk by itself.

Being cross-examined by defendant's counsel, witness testified in substance as follows:

Q. Is a thing not a beverage which is not drunk by itself?

A. This is drunk with water, with the addition of something else, as gin, whisky, or brandy, while curacoa, kirschwasser, &c., is drunk by itself.

Q. Please answer the question. May not the thing be a beverrge even if it is not drunk by itself?

A. It must be a beverage if drunk with anything else, if people drink it; there are a dozen other bitters we use over our bar; I can not think of them all; Bowker's Bitters; Bonoekamp Bitters; Ramsey's Bitters, very much like this; Orange Bitters; Hostetter's Bitters; Peruvian Bitters, and others; Hostetter's and bitters of that kind are drunk by themselves; they

are beverages; people call for them as a drink; they are never used
39 in cocktails, or very rarely; I have seen them used in cocktails; Orange Bitters are very frequently used in cocktails; we use absinthe occasionally with cocktails; mixed sometimes with other liquors or with other liquids; Angostura Bitters is used with sherry very frequently; also with other mixed drinks, with gin cocktails, whisky cocktails, and brandy cocktails; not with other mixed drinks; perhaps with champagne cocktails; we use Angostura Bitters very extensively in our bar; consume a great deal of it in the course of a year; it is one of the principal bitters; we deal it out to our customers over the bar every day in cocktails.

By PLAINTIFFS' COUNSEL: A Angostura Bitters is used as a flavor, is it not?

(Objected to by defendant's counsel as asking for a conclusion. Question allowed by the court. Exception by defendant's counsel, which exception was allowed by the court.)

A. Yes; to flavor the cocktail

(By defendant's counsel:) Orange bitters is used as a flavor also, and all the other bitters which are put into drinks; they are used for flavoring the same as absinthe.

Plaintiffs further produced the evidence of—

EDWARD G. WELLS, who, being duly sworn as a witness for the plaintiffs and examined by plaintiffs' counsel, testified in substance as follows: My business is proprietary articles with Charles H. Crittenden.

They are dealers in proprietary articles; we sell the articles before me as a staple in our trade, Angostura Bitters. I have sold the article
40 as far as my memory serves me; I have been in business for 25 or 30 years; I don't know as I would say that it was 30 years ago, but it is a great many years ago; we sell to the drug trade; we deal in patent and proprietary articles; I cannot state from my own knowledge what that article is used for, what our customers use it for; of course I don't know what people take these things for; we know how we sell them and how they are ordered; we sell them to the druggists; I cannot tell how much of that we sell in a year; we usually have it in stock.

Being cross examined by the defendant's counsel: We keep from 5,000 to 10,000 other articles in stock; the great majority are proprietary articles; our business is the patent medicine business; we call them proprietary articles. I call Angostura Bitters a proprietary article from our standpoint, not a patent medicine; we call the majority of the things proprietary articles. [Showing paper to witness.] That is our catalogue for 1888 and 1889; malt, Duffy's, we call that a proprietary article; it is Duffy's Malt Whisky; I don't know how it is made; there is a difference between Duffy's Malt Whisky and other whisky made out of malt; we do not stock rye whisky; we might possibly fill an order for it; I would not undertake to say that, because the routine of our business is very large; we occasionally get an order for grape wine for communion wine, or something like that; if we had an order from a druggist in the city for a quarter dozen of champagne, we would probably procure it for the
41 order; I do not say positively that we would; we might do so; we do not stock it; we have a variety of cordials; we have infant's cordial and grandmother's cordial; we do not keep curacoa; we do not keep mint cordial, creme de menthe; we keep nothing of that class of

goods; we possibly may have in our stock such a thing as Spear's port wine when that is used as a medicine; we may have some of that in stock; I would not undertake to say that we have not; we do not keep liqueur chartreuse, nor benedictine.

To sustain the issues upon his part the defendant produced the evidence of—

RUSSELL W. MOORE, who, being duly sworn as a witness on behalf of the defendant and examined by the defendant's counsel, testified in substance as follows:

(It is admitted upon the record that Mr. Russell W. Moore, the witness, analyzed the bitters in suit.)

My business is analytical chemist at the appraisers' stores in New York; have been in that position for two or three years; prior to that was chemist for the New York State dairy department for about 3 years. I graduated from the College of New Jersey at Princeton; was assistant in the school of mines, Columbia College, to the professor of analytical chemistry, and since my graduation have been engaged in the practice of analytical chemistry; this was the bottle, I believe, that I received of the bitters in suit; I analyzed a sample of these bitters for the purpose
42 of ascertaining the alcohol which it contains; my report of the analysis states: Absolute alcohol by volume, 47.30; absolute alcohol by weight, 39.20; those figures relate to the percentages of weight and by volume. I am familiar with the term "proof spirits;" proof spirit is a spirit of a strength established by act of Parliament; it contains 49.24 per cent by weight of alcohol and 50.76 per cent by weight of water, at a temperature of 51 degrees of Fahrenheit; it is an arbitrary standard fixed by the British Government for excise purposes; it is approximately half and half; the sample of Angostura Bitters which I have analyzed is below proof—about 6 degrees below proof; I have analyzed absinthe for the purpose of determining the alcohol in it; the alcohol by volume is from 65 to 72 per cent; by weight from 61 to 68 per cent; the alcohol in cordials, by which I understand substances like creme de menthe and creme de cacao, would run from 50 to 70 per cent by volume; in liquors the alcohol runs from 40 to 60; I mean generally, such as rum, brandy, and whisky; that is by volume; I have analyzed a cordial known as creme de menthe, or what would be known in English as peppermint cordial; the alcohol in that ran 57 per cent by volume; I have never analyzed curacoa; from my general experience in the analyses of cordials I would state that curacoa is low; it runs from 28 to 35 per cent by volume; I have not analyzed a cordial known as creme de vanille, but the
43 alcohol generally would run in it in that cordial within the limits given for the cordials that I have given, from 65 to 72 per cent; the percentage of alcohol by volume in Anchor Bitters was 44.5 per cent by volume; I have analyzed Fernet Bitters; the amount of alcohol in those was 47.9 by volume; I have analyzed Boonekamp Bitters for alcohol; the analysis for one sample was 46.5.

Being cross-examined by plaintiffs' counsel:

Q. In your analysis of Angostura Bitters did you find anything else in the bitters except alcohol?

A. That was as far as the analysis was conducted; I only tested for alcohol.

Q. Did you find a residual of any other substance besides alcohol?

(Objected to by defendant's counsel, on the ground that the analysis was made only for the purpose of ascertaining the percentage of alcohol. Question allowed by the court; exception by defendant's counsel, which exception was allowed by the court.)

A. There was a residual; I could not tell what the residual was composed of without further analysis; I did not examine it enough to know what it was.

Q Was there more alcohol, in your judgment, in the bitters than was necessary to hold in proper solution and to preserve the other ingredients in it?

A. I think that the same effect would have been produced with less alcohol. I have no very definite idea what the substances were, except in a general way; in a general way they were the aromatic, tonic, or bitter principle; that is my impression of it. I detected nothing, except
44 from the appearance, to lead me to believe that there was Peruvian or Angostura bark in it; I made no analysis for that purpose. From the appearance it looks as if there were Angostura bark; there might be bitter orange in it; possibly gentian. I don't know as to that; I cannot say; there might be a great many things.

Q. Have you any idea amounting to a belief what any particular article there was except the Angostura bark?

(Objected to by defendant's counsel; question allowed by the court; exception by defendant's counsel, which exception was allowed by the court.)

A. No, I have not; I could not tell; I did not try to inform myself on that point at all; I don't know what the properties of Angostura bark are.

Q. Are you able to state what the points of resemblance and what the points of difference are between Angostura Bitters and the bitters you have analyzed?

A. I should say that they generally resemble each other, differing in flavor.

Q. Are they both fit to be drunk, both beverages, both fit to be drunk?

A. I suppose they are meant for drinking; I really can not answer the question. Fit to be drunk? Yes, they are put up in bottles and meant to be drunk; from the way they are put up I judge that is the intention; they taste different; the flavor is different; I judge not made with the same materials; absinthe contains fully 72 per cent of alcohol in volume; kirschwasser is a great deal lower; kirschwasser is a species of brandy distilled from the wild cherry, the small black cherry; I can not tell
45 whether the article in suit is made of brandy; there is so much else there that I cannot tell whether there is brandy or not; I should say that these Angostura Bitters were not distilled from wild cherry; I have seen vinegar bitters, but have never examined it; I have heard that it contained alcohol; I don't know.

Defendant further produced the testimony of—.

JOHN F. DAVIS, who, being duly sworn as a witness for the defendant and examined by defendant's counsel, testified in substance: I am an examiner of drugs at the appraiser's stores; have been in that position for a little over a year; before that was chemist in the United States laboratory

in the appraiser's stores for about eight years; before that I was a practitioner of medicine; I am a doctor of medicine; am practicing medicine at the present time after hours; my practical training was for about twelve years in the drug business, five years at college at the Bellevue Hospital Medical College. I graduated in medicine.

Q. Have you ever made Stoughton Bitters?

A. I have.

Q. Will you state what their composition was in substance.

(Objected to by plaintiff's counsel as irrelevant; question excluded by the court; exception by defendant's counsel, which exception was allowed by the court.)

Q. What was the amount of alcohol contained in Stoughton Bitters?

(Objected to by plaintiff's counsel; question excluded by the court; exception by defendant's counsel, which exception was allowed by the court.

46 In the medical profession there is nothing known as bitters merely.

Q. How do you administer tonic properties in medicine?

A. Many times by substances known as bitter substances, or having bitter properties, and which taste bitter; gentian is one of these properties.

Q. What is the medicinal effect of gentian?

A. Sometimes the impression upon the senses is a great deal more than the impression upon the system; it has a slight medicinal effect.

Q. When tonic bitters or a tonic substance is given in medicine is the amount of alcohol administered with them large or small?

A. Do you mean bitter substances that are given as a tonic?

Q. Yes.

A. It is never our intention to give much alcohol when we give a bitter substance; it is not recognized as proper; we get a stimulating effect from the alcohol, and we do not want it in the tonic property of the drug. The effect of the alcohol is different from the stimulating effect of the drug. With tonic drugs we administer as little alcohol as possible. Angostura or angostura bark is not in the pharmacopœia at the present time, nor was it in 1889. I have seen a cordial known as cream of peppermint or creme de menthe. I am familiar with the substance peppermint as an herb; it is not generally given as a medicine; it has a medicinal effect; it is called a carminative generally. The meaning of that expression is

47 that it is a remedy used as a general thing for flatulency, gasses in the stomach and bowels. It is a slight stimulant in its action, that is all. I have seen an article known as kirschwasser. At one time I made a distillation of it that contained alcohol, but I don't recollect the percentage of alcohol. Kirschwasser contains a little hydrocyanic acid; hydrocyanic acid is a virulent poison; it is generally called prussic acid; it has a medicinal effect if taken in very small quantities; it is combined in cough medicines as a general thing as a carminative or antispasmodic. I have seen the article called absinthe, and I think that I have distilled a sample of it for the purpose of determining the amount of alcohol that it contains.

Q. The definition of absinthe has been read in evidence by the plaintiff as follows: "A cordial or brandy flavored with wormwood." Are you familiar with the substance wormwood?

A. Yes; wormwood is an herb generally known as artemisia absinthium; it is an ordinary garden plant known as wormwood; wormwood has a medicinal effect when administered; it is given as many other bitter substances are given and for the same purpose; it is given in flatulency, dyspepsia, and in the form which is known as loss of tone of the stomach, so as to create a desire for food where there is not much, and for general debility; it is also used for removing worms, and as an emetic; I don't know what else is contained in the absinthe, with the exception of essential oils; there is generally a combination of them; a great deal of the absinthe is used with the essential oil of the wormwood; a certain amount
48 of the leaves may be used for obtaining a coloring matter and then there are the flavoring oils of anise, of fennel and other aromatic oils, to produce the flavor; the oil of anise has a similar medicinal quality to peppermint; its effect upon the human system is such that it will produce death if taken in large quantities; it is used chiefly in the practice of medicine as a medicine for infants and children for mild colic which infants are liable to have, and for flatulency; it has no other use in medicine, only as a corrective, as an aromatic, or as a flavor.

Being cross-examined by plaintiffs' counsel, witness testified:

Q. Can you state whether these articles which you have testified about, absinthe, kirschwasser, and the cordials, will you state in what points they resemble, and in what points they differ from Angostura Bitters?

(Objected to by defendant's counsel on the ground that this is the question for the jury; question allowed; exception by defendant's counsel, which exception was allowed by the court.)

A. The only thing that I would speak of would be the absinthe; it is given for some purposes in small doses. Unless a man is a chronic drinker he will not take absinthe; that is one difference between the two. In the kirschwasser, of course, there is a certain amount of similarity between its use and the Angostura Bitters. I don't know that the other articles are used as flavors; I could not tell whether they are used for making mixed drinks.

Q. Can you state the amount of wormwood that there is in absinthe?

A. It is impossible for anyone to tell that, or even the amount
49 of Angostura bark in the Angostura Bitters; absinthe is not use' medicinally at all; that is, in the condition known as absinthe; there is in the German pharmacopœia an extract which is a similar product, but containing the essential oils, and which is not drunk as is the absinthe which you get at the bars; the absinthe which is named in the tariff act and the absinthe which is drunk at bars I would not describe as a medicine, and I don't know how much of the herb there is in it; of the other articles here I am familiar with them as regards the odor, and I have seen the published analysis, but I have never analyzed each one separately; I have obtained alcohol from it just for the purpose of finding out the percentage of alcohol.

Q. Then the rest of these ingredients except as to the amount of alcohol is a matter of conjecture, or of reading?

A. No, sir; it is not. It is a matter of the senses, to a certain extent; we have to make use of those in chemistry; I have never analysed Angostura Bitters, and don't know what is in it with the exception of alcohol; I know the constitution of Angostura Bitters only as given in the published formula.

Q. And you know the absinthe in the same way?

A. No, sir; I know that by actual observation.

Q. You know the kirschwasser in the same way?

A. I have distilled the alcohol in kirschwas'er, but it is only a faint impression that I have with regard to it; I know how it is made.

Q. Ratafia—have you examined that?

50 A. I do not know anything about that.

Q. Cordials?

A. No, sir.

Q. Your testimony with regard to the constitution of cordials—was that based upon actual senses or upon reading?

A. Did I state that I had analyzed cordials?

Q. I think you stated that you had analyzed creme de menthe.

A. No, sir; I have not analyzed it, but I had tasted it, and had seen the article, and had prohibited its use; I know that it contains an enormous amount of alcohol and keeps a man drunk a good deal of the time.

Q. Do you know peppermint except by actual senses?

A. It does not need an analysis; you can smell it.

Q. Could not that smell be simulated by the use of the essential oil?

A. The essential oil, as a general thing, must be obtained from the peppermint plant; it could not be simulated in any other way; I do not think that there is any synthetical compound representing peppermint at present; none that I know of; I do not know what creme de menthe is used for, only as a drinker's cordial, as a drink; you can drink it at a bar, although many of the ladies have it on their dressing cases; many take a part of a wine glass of it three or four times a day.

The defendant further produced the testimony of

EDMUND D. STRYKER, who being duly sworn as a witness for the defendant, and examined by defendant's counsel, testified in substance: I am a salesman and buyer of H. B. Kirk & Co., 66 Fulton street and 9 Warren street; the business of the firm is wholesale and retail

51 liquor dealers; have been in business with them eight years; the sample bottle on the desk before me seems to be Angostura Bitters; I recognize it; the firm of H. B. Kirk & Co. have dealt largely in it; they sell it principally to private families and to the wholesale liquor trade; to the retail liquor trade also; about five years ago, I think, we sold other Angostura Bitters; it was called Caracas or Angostura Bitters; it was not sold very largely at that time; it was sold as a beverage to families and to the retail liquor trade.

Being cross-examined by plaintiffs' counsel: We sell this largely to the family trade; sell other kinds of bitters besides Angostura; I don't know of my own knowledge whether all bitters that we sell contain alcohol; I never analyzed them; I believe that they contain alcohol; I should judge that they contain alcohol by tasting; I am not positive about all the bitters that we sell; we sell bitters that I have never tasted.

Q. But those bitters that you have tasted contain alcohol?

A. I beli've so.

Q. What bitters do you refer to, what other bitters containing alcohol; what is the name of them?

A. Boonekamp, Bowker's, and Hostetters; we sell kirschwasser.

Q. Will you please state what are the points of difference and what are the points of resemblance between kirschwasser and Angostura Bitters?

(Objected to by defendant's counsel; question allowed by the court; exception by defendant's counsel, which exception was allowed by the court):

A. In what way do you mean?

52 Q. Any way under heaven?

A. They are both beverages, as far as I know; there is no difference there; they differ in color and in taste; as far as the ingredients go, I do not know; they are entirely different in color and in taste.

Q. Used for the same purpose as far as you know, or don't you know?

A. I do know, yes; and they are both used in cocktails for a flavoring. I am acquainted with cordials such as creme de menthe, curacoa, and cordials of that kind; we sell those.

Q. What are the points of difference and what are the points of resemblance between those and Angostura Bitters?

A. They are a beverage sold in bottles; they may differ in color from Angostura, and from each other, and in flavor, both in flavor and in color; I understand arrack to be a distillation pure and simple, or with the addition of sugar, perhaps, that differs from Angostura Bitters in color and flavor; it is not a bitters; we sell absinthe; absinthe is a cordial, and it has the same difference that the other cordials have, differing in taste, differing in flavor, and differing in price also, and differing in the size of the bottles, and in the labels, and in the corks, and the capsules, and a few other differences.

Q. Do you know the amount of alcohol contained in any of these articles, the absolute amount of alcohol?

A. I do not.

Q. You know them simply as commercial articles as they are sold?

53 A. That is all; I am not prepared to say that as a commercial article Angostura Bitters is the same thing as cordials and as kirschwasser.

Defendant further produced the testimony of

HENRY CAMMEYER, who, being duly sworn as a witness for defendant and examined by defendant's counsel, testified in substance: I am a clerk with Thurber, Whyland & Co., wholesale grocers in New York City; they are large wholesale grocers; have been with them about three years; before that in business for myself in the wine and spirit trade, wholesale, for about twenty years; from the external appearance I am familiar with the articles on the desk before me, from the appearance of the bottles; I don't know anything about the contents; I never tasted it; it smells like all bitters; Thurber, Whyland & Co. deal in that article; it is one of the articles that they carry in stock.

Q. In what department of your business do you keep it?

(Objected to by plaintiffs' counsel as immaterial; question excluded; exception by defendant's counsel, which exception was allowed by the court.)

We sell the article to our general trade, to grocers, &c.; we sell some to liquor trade, to hotels, &c.; I should call it a staple article.

Being cross-examined by plaintiffs' counsel, witness testified: We sell cordials; we sell liquors generally, wine, brandy, gin, &c., and arrack and kirschwasser; that is a cordial; we sell that.

Defendant further produced the testimony of

ELIAS HARTMAN, who, being duly sworn as a witness for the
54 defendant, testified in substance: My business is importer of wines and liquors; in the firm of Hartman, Goldsmith & Co.; have been in the business about twenty years; importer of liquors and wines; I am familiar with the goods represented by the sample in suit; our firm handles it; they handled it quite a while; for several years; we sell it to wholesale houses and also to retail; to the very best houses; to large wholesale houses and liquor dealers in this city and everywhere else in the United States; it is not one of our staple articles; we sell it only upon demand, not otherwise; we do not sell a considerable quantity of it per year; we have some other bitters also; we import one by the name of Malikoff Bitters.

Defendant further produced the testimony of

JACOB BLENDERMANN, who, being sworn as a witness for the defendant and examined by defendant's counsel, testified in substance: My business is retail liquor business, at 100 West street, New York City; been in business about 23 years; in this city all the time. I am familiar with the sample on the desk before me; have known it ever since it has been in existence. I use that article in my business just to flavor drinks—in mixing drinks; just a dash into a cocktail; that is about all that it is used for. I use it very seldom in other drinks besides cocktails. Once in a while I mix it with champagne. I use it in the way that I have described, as my customers call for it over the bar, in my regular business. It is an article that I use frequently in my business—considerable quantities of it every year.

55 Being cross-examined by plaintiffs' counsel: On an average I suppose we use ten cases of it a year; we use the whole ten cases at the bar, as a flavor in mixing drinks.

Q. And in using it you turn it into a glass—just a dash?

A. Yes.

Q. That is, as a kind of sauce, just a dash of it?

A. That is all, yes; I am acquainted with cordials; cordials are absinthe, curacoa, chartreuse, benedictine, and all kinds of cordials. They are drunk in a glass as a drink.

Q. As a whole drink?

(Objected to by defendant's counsel; question allowed; exception by defendant's counsel, which exception was allowed by the court.)

A. Yes. I know the article called kirschwasser; that is used as a drink, as a whole drink.

Q. What are the points of similarity and what are the points of difference between those articles you have spoken of and this article Angostura Bitters?

(Objected to by defendant's counsel on the grounds already stated; question allowed; exceptions by the defendant's counsel, which exception was allowed by the court.)

A. This Angostura Bitters is used as a flavor, while the cordials are drunk by the glass.

(Redirect examination by defendant's counsel:) I do not put pepper sauce in drinks over the bar, or catsup, or anything of that sort; I know orange bitters; we use them for flavoring; we mix the drinks and serve it to our customers with those bitters in; we serve absinthe to our customers over the bar.

56 Q. These cordials that my friend has asked you about, do you deal those to your customers over the bar?

A. Yes.

Q. They are all drunk at your bar?

A. Yes; they are supposed to be.

Defendant further produced the testimony of

CHARLES L. CHASE, who, being duly sworn as a witness for defendant and examined by defendant's counsel, testified in substance: I am proprietor of the Occidental Hotel; there is a bar at that hotel; I am the proprietor also; I know the article of which the sample bottle is on the desk before me; it is Angostura Bitters; it looks like it; I have used that article in the bar, at the Occidental Hotel, for twelve or thirteen years; it is used for mixing cocktails; sometimes with sherry and sometimes with champagne cocktails; I do not know of any other uses; it is served to my customers over the bar in the way I have described, mixed with drinks, and sold over the bar; there are no other Angostura Bitters that I know of; I serve other bitters over the bar at the hotel; some of them are orange bitters, Bornekamp Bitters, Boker's Bitters, Caracas Bitters; Caracas Bitters is used for mixing with drink.

Being cross-examined by plaintiffs' counsel: That is the largest use of bitters to mix with drinks—as far as I know, as an ingredient of the drinks; these Angostura bitters are used by squirting it in; by putting in about a teaspoonful in a glass; in an ordinary cocktail glass, as a flavor, I suppose; that is what we use it for; I have never used it much myself.

57 Q. Is it ever used, to your knowledge, when you feel a little bad, for the purpose of making you feel better, to tone up the stomach as a stomachic bitters?

(Objected to unless the witness is a physician; question allowed; exception by defendant's counsel, which exception was allowed by the court.)

A. I suppose it is used the same as all drinks.

Q. That is what it is used for?

A. The same as all drinks; I deal in cordials, curacoa, and kirschwasser; some in benedictine; these cordials are used in various ways to make pousse café, for drinking and flavoring; they are used to drink by themselves sometimes; as a rule I should say I should think so generally; we call this Angostura a flavor; that is the way we use it in cocktails.

Redirect-examination by defendant's counsel: A cocktail glass is a large-sized wine glass, I should say; it contains about as much as half of a whisky tumbler; I should think the whisky tumblers to which I am referring would hold about half a pint; and a cocktail glass contains about half of a whisky tumbler; some whisky tumblers are large and hold as much as a goblet; others are smaller and hold a gill; there is about a teaspoonful of Angostura in a cocktail glass of liquor, on the

average, and the cocktail is manufactured by mixing whisky, water, liquor, bitters, and sometimes some other flavoring; it is made with liquor and then mixed with ice and other things, and Angostura is one of those things; a pouse café is a mixture of different cordials; never mixed one; never noticed so as to say how many kinds of cordials are used; it is a mixture of several kinds of cordials; such cordials as curacoa, bene-
58 dictine, and I do not remember the names of all the cordials now—a number of cordials; a pousse café does not consist of any one cordial; pousse cafés are served over my bar to customers sometimes; I serve absinthe over my bar; I think we use kirschwasser; I do not keep track of all those things.

Defendant further produced the evidence of

WILLIAM MUNCH, who, being duly sworn as a witness for defendant and examined by defendant's counsel, testified in substance: My business is wholesale liquor business with Max Stern & Co., 36 Vesey street; they do considerable wholesale liquor business, dealing in liquors of all description; have been with them about eight years; am one of the firm; have bought and sold the goods in which the firm deals during all that time; I have known the article represented by plaintiff's sample for about the same time that I have been in business; I bought and sold that article, and did in and prior to 1889; we sell the article to liquor dealers mostly in the city of New York, Brooklyn, Jersey City, and the suburbs; we sell some to hotels; the article is a staple article in our trade.

Q. Do you at the present time, or did you in 1889 and 1890, deal in any other article known as Angostura Bitters?

A. Yes.

Q. What article was that?

A. Angostura Bitters; it came from Cincinnati, in this country; we sold it to our customers, to the same line of people, by the case, dozen,
59 or half dozen, as they wanted it; we sold a considerable quantity of it in this city.

(By plaintiff's counsel:) That was up to the present time; we are selling it now.

(By defendant's counsel:) That article is called Angostura Bitters; that Angostura Bitters, to which I have referred, made in Cincinnati, was used for mixing drinks for precisely the same purpose as those for which the article in suit is used; we sell those two Angostura Bitters at the present time to the trade in New York City and in the environs.

Being cross-examined by plaintiff's counsel:

Those Angostura Bitters from Cincinnati are not known as Siegert's Angostura Bitters; they are made by Rhinestrong Brothers; there is a difference in price between the two; these here are the most expensive; the Angostura Bitters is the most expensive.

Q. In your opinion, is the Cincinnati bitters an imitation of those bitters?

A. It is called the same; it is Angostura Bitters; I don't know whether it is an imitation of these or not; we deal in it some; I never took any particular notice of the amount; we sell some more of it than we do of that; I am quite certain that the name Siegert is not on the Angostura Bitters, and that it is not known as Siegert's Angostura Bitters; they are

two different kinds, bearing a different price; I don't know about the difference in taste; there might be some slight taste different; some difference in taste; we do not sell these Angostura Bitters before me very much to the grocery trade, but some; very little to families; we sell it
60 at retail to individuals, not much to speak of.

Defendant further produced the testimony of—

FRANK S. EDMINSTER, who, being duly sworn as a witness for the defendant, testified in substance: My business is treasurer of the R. H. McDonald Drug Co.; their business is manufacturing vinegar bitters principally; have been connected with the company since 1872; in my present capacity for only two years; prior to my present position I travelled for the company; was manager and held various positions and was in the manufacturing department; the article vinegar bitters made by my company has been known in this country about thirty years; I have known it since 1870.

Q. Will you please state to the court and jury whether there is any alcohol contained in the vinegar bitters?

A. There is not.

Q. Was there any spirits contained in them at the time of the passage of the tariff act of March 3, 1883?

A. No, sir. I would like to modify that statement in this way: That by analysing it is found that there will generate from the sugar that enters into it about 12 per cent of alcohol; I believe that it will show that; that is all; there is no alcohol used in the preparation, in the manufacture of vinegar bitters; whatever alcohol may afterwards be found in the bitters is generated by the compound; I have had my chemist analyze it; there is from 10 to 12 per cent, not more than that; it is rarely below 10 per cent; this vinegar bitters has been extensively sold in the United States at and prior to March 3, 1883.

Being cross-examined by plaintiff's counsel, witness testified: I
61 have had quite an experience in the manufacture of bitters, and have endeavored to discover a method of making bitters without alcohol.

Q. Are there any other bitters besides yours that you know of in this country that are made without containing alcohol?

A. Atwood's Jaundice Bitters; I have examined very many bitters, and I can tell from my experience from the taste and smell immediately whether there is alcohol to any extent in any bitters.

Q. Is not alcohol to some extent necessary in order to preserve the herbs, roots, and other articles which are contained in the bitters so as to keep it for any length of time?

A. It is calculated that it takes twenty per cent of alcohol to preserve any medicine; that is wherein our secret manufacture of the vinegar bitters is superior to all others, from the fact that we can preserve it without alcohol.

Q. Except these twelve per cent?

A. You can find some alcohol in almost anything; in my opinion it is necessary in the manufacture of bitters to have in or to produce alcohol to some extent as a preservative of the other contents of the bitters.

Testimony closed on both sides.

Counsel for defendant moved the court for a direction of verdict for the defendant upon the following grounds:

(1) That plaintiff's article is not "proprietary" under the author-
62 ity of Ferguson v. Arthur, 117 U. S., 488, or Grommes v. Seeberger, 41 Fed. Rep., 32.

(2) That the article is enumerated under paragraph 313 of the tariff of 1883 as "bitters, containing spirits."

(3) If it should be held that the article is likewise enumerated under paragraph 99, then the higher rate is the true one according to the provisions of the similitude clause, R. S., 2499.

The COURT. I am unable to assent to the proposition that the words of enumeration in schedule 99 are to be restricted to proprietary medicines, in view of the fact that Congress has itself changed the language of the section, and now no longer uses the words "proprietary medicines," but has substituted the broader term, "preparations or compositions." That being so, I am constrained to deny the motion of the defendant. * * *

This case, therefore, will be given to the jury (as the last one was) under the instructions that they will confine their attention to the determination of the similarity or dissimilarity between the Angostura Bitters in this case, and the cordials, liquors, &c., enumerated in paragraph 313.

(To which refusal by the court to direct a verdict for the defendant, counsel for the defendant duly excepted, which exception was allowed by the court.)

Defendant's counsel then asked to go to the jury:

(1) On the question whether this is a proprietary article, recommended, &c., or prepared according to a private formula, as a remedy for diseases, &c., of the human body.

63 (2) On the question of similarity of the article in suit and the cordials, liquors, &c., under paragraph 313 of the tariff of March 3, 1883.

The COURT. I will let you go to the jury as to the second. As to the first, I deny your request to go to the jury, and give you an exception.

(To which denial by the court defendant's counsel duly excepted, which exception was allowed by the court as above.)

Defendant's counsel then requested the court to charge the jury as follows:

First. The jury must find a verdict for the defendant in this action unless they are convinced by a fair preponderance of proof.

1st. That plaintiffs' bitters are a proprietary preparation recommended to the public as a proprietary article or prepared according to some private formula as a remedy or specific for any disease or diseases or affections whatever affecting the human or animal body. And in determining this question it will not be sufficient for the jury to find that the person or persons preparing the article affixed thereto their name or names; nor would the fact that a label or circular of plaintiffs' articles has been registered in the Patent Office at Washington be conclusive. To constitute such article a proprietary preparation within the meaning of the law, the jury must find upon a fair preponderance of proof, that the article was manufactured by some private, secret, or special method or manner involving special care in the manufacture, and giving to the article some definite and
64 distinct peculiarity or difference from any other Aromatic Angostura Bitters or Angostura Bitters, known to the trade at the time

of the importation of plaintiffs' goods; or that such preparation was made by means of a private or secret formula giving to the article a distinct specific character as a medicine, and the burden is upon the plaintiffs. Unless the jury are convinced as above stated by the foregoing requirements, they can not find the plaintiffs' bitters to be a proprietary preparation within the meaning of T. I. New., 99.

2nd. The jury must find a verdict for the defendant unless they are further convinced by a fair preponderance of proof that plaintiffs' bitters 're neither cordials, liquors, arrack, absinthe, kirschwasser, ratafia, nor similar to these; and in considering the question of similarity the jury should take into consideration any and all of the above mentioned compositions, the appearance presented to the senses, the adaptability of these compositions for use, the uses for which they are sold, and the effect that they produce, and compare all these qualities with those of the plaintiffs' article in reaching a conclusion upon the question of similarity. Absinthe contains wormwood, which is bitter to the taste. Looking at the question of similarity or dissimilarity on these various grounds you will determine whether plaintiffs' article does or does not present any substantial similarity to those enumerated articles. In considering the question of similarity you will also take into account the chief or principal use to which
65 you may find plaintiffs' article is applied, but includes the idea of difference. Similarity is not absolute likeness. If the jury find plaintiffs' goods similar under the above instructions to cordials, liquors, arrack, absinthe, kirschwasser, or ratafia they should find a verdict for the defendant.

(Which request (including subdivisions 1st and 2nd) was refused by the court, to which refusal defendant's counsel duly excepted, which exception was allowed by the court.)

The court thereupon charged the jury, as follows:

LACOMBE, J. Gentlemen of the jury: The only paragraph of this statute with which you are to concern (the other points being decided by the court) is the paragraph 313, which reads as follows:

"Cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits and not especially enumerated or provided for in this act, two dollars per proof gallon."

The question for you to determine, affirmatively or negatively, under this paragraph is whether the Angostura Bitters which the plaintiffs has imported here, and which does as matter of fact contain spirits, is a similar beverage, or bitters, to cordials or to liquors, or to arrack, or to absinthe, or to kirschwasser, or to ratafia. What those various articles are has been told you by the witnesses. What Angostura Bitters is has also been explained to you.

In determining the question of substantial similarity as between the imported article and the others which are enumerated in the para-
66 graph you are to take into consideration the appearance of the articles as presented to the senses, their component materials, their adaptability to use, the uses for which they are sold, and the effect which they produce. Taking those into consideration, if you reach the conclusion that the Angostura Bitters imported here is a similar beverage to the cordials, to the liquors, to the arrack, to the absinthe, to the kirschwasser, or to the ratafia enumerated in paragraph 313, then your verdict will be

for the defendant, the Government. If, on the contrary, you reach the conclusion that the Angostura Bitters is not similar to those enumerated articles, cordials, &c., then your verdict will be for the plaintiff.

I have been requested by counsel for both sides to charge various requests, all of which I decline, except two presented by the defendant. Of those one is as follows:

"The presumption of law is in favor of the correctness of the defendant collector's classification of the merchandise for duty, and this presumption can only be overcome by a fair preponderance of proof that such classification was erroneous, as claimed in the plaintiffs' protests. The collector's classification must stand, unless you are convinced that the plaintiffs' contention as claimed in his protest is the true one; otherwise your verdict must be for the defendant."

The next request by the defendant I charge, viz:

"That the labels on the plaintiffs' goods and the circular accom-
67 panying each case are not to be taken by the jury as proof of any matters of fact which may be stated in such labels or circulars.

In other words, they are proof of what the maker claims his goods to be, but not proof of what his goods really are.

There is an exception, of course, to each refusal to charge as requested.

Mr. HARTLEY. I will ask the court to charge further, that the mere presence of alcohol in Angostura Bitters is not conclusive of its similarity to cordials, because alcohol is found in cordials also.

The COURT. I so charge. That is not a conclusion of the question.

Mr. VAN RENSSELAER. I ask your honor further to charge one clause of my request (your honor having given me an exception to the refusal to charge the whole): That similarity does not exclude the idea of a difference.

The COURT. That is true; similarity is not absolute likeness, but includes the idea of difference. I so charge.

Mr. VAN RENSSELAER. Your honor will give me the benefit of an exception to your sending only this one question to the jury instead of the two.

The jury rendered a verdict in favor of the plaintiffs for $3,091.41.

And forasmuch as the exception, matters, and things aforesaid would not otherwise appear on the record, I have settled and signed this bill of exceptions on the prayer of the said defendant by his counsel, and it is ordered that the same be filed as a part of the record herein, with
68 like force and effect as if the same had been reduced to writing, signed, and filed before the cause was given to the jury.

Witness my hand at the city of New York this 18th day of June, 1891.

E. HENRY LACOMBE.

The above bill of exceptions as above amended may be filed as and for the bill of exceptions herein.

HARTLEY & COLEMAN,
Plff's Attys.

(Endorsed:) 16212. U. S. circuit court, southern district of New York. Josephine Wuppermann et al. versus Joel B. Erhardt. Defendant's bill of exceptions. Edward Mitchell, United States attorney, attorney for defendant. U. S. circuit court. Filed June 18, 1891. John A. Shields, clerk.

69 Supreme Court of the United States.

JOEL B. ERHARDT, PLAINTIFF IN ERROR,
vs.
JOSEPHINE W. WUPPERMANN AND GEORGE Wuppermann, defendants in error.
} Assignment of errors.

Afterwards, to wit, on the eighteenth day of July, 1891, before the justices of the said court at the Capitol, in Washington, come the said plaintiff in error, by Edward Mitchell, U. S. atty., his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

EDWARD MITCHELL,
U. S. Attorney, Attorney for Plaintiff in Error.

70 (Endorsed:) 16212. United States Supreme Court. Joel B. Erhardt, plaintiff in error, vs. Josephine W. Wuppermann & ano., defendants in error. Assignment of error. Edward Mitchell, U. S. atty., attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted, this 24th day of June, 1891. Hartley & Coleman, attorneys for defendants in error. To Hartley & Coleman, esqrs., attorneys for defendants in error. U. S. circuit court. Filed June 24, 1891. John A. Shields, clerk.

71 Supreme Court of the United States.

JOEL B. ERHARDT, PLAINTIFF IN ERROR,
vs.
JOSEPHINE W. WUPPERMAN ET AL.
} 16212. Joinder in error.

And afterwards, to wit, on the 18th day of July, 1891, the said defendants in error, by Edward Hartley, their attorney, come here into court and say that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And they pray that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWARD HARTLEY,
Attorney for Defendant in Error.